No. 82-960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

CITY DISPOSAL SYSTEMS, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT CITY DISPOSAL SYSTEMS, INC.

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QUESTION PRESENTED

Whether an employee's individual refusal to perform assigned work which he merely claims (without substantial objective evidence) to be unsafe for him personally, in the absence of any grievance under or reference to a collective bargaining agreement, and without any involvement of his union or of other employees, constitutes "concerted activities" protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157.

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Respondent City Disposal Systems, Inc.[1] respectfully requests, for the reasons discussed herein, that this Court affirm the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this matter on July 22, 1982 (683 F.2d 1005 (6th Cir. 1982)), denying enforcement of the Decision and Order of the National Labor Relations Board (256 N.L.R.B. 451 (1981)).

COUNTERSTATEMENT OF THE CASE

To avoid any misunderstanding of the nature of the question framed for review in this matter, or the procedural posture of the case, Respondent supplements as follows the Board's statement of the factual and procedural background.

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[1] Respondent City Disposal Systems, Inc., a Michigan corporation, is a wholly owned subsidiary of City Liquid Treatment And Reclamation, Inc., a privately held Michigan corporation; neither has non-wholly owned subsidiaries or affiliates.

1. Subject to the corrections provided hereafter, Respondent does not disagree with the recitation of the words and actions of employee James Brown on May 12 and 14, 1979 as set forth in the Board's Brief (at 3-4). Brown was indeed discharged by Respondent on May 14, 1979, following his words and actions, for the reason that he insubordinately refused a job assignment (J.A. 67). However, Respondent strenuously disagrees with the Board's characterization of Brown's words and actions throughout its argument. Brown's refusing to drive truck No. 244 (instead simply going home) and saying "I don't want to take the truck because the truck has got problems and I don't want to drive it" (Pet. App. 13a; J.A. 12) cannot fairly be described as "mak[ing] a claim" under the collective bargaining agreement (Board Brief at 20); or as "making a contract-based protest" (Board Brief at 23, 29); or as "serving notice" of a "relevant provision in the contract" (Board Brief at 25); or as "invoking" "collectively secured rights" (Board Brief at 27); or, finally, as "claim[ing] a right to refuse to operate truck No. 244" (Board Brief at 32).

By such characterizations, the Board is evidently attempting *factually* to convert or elevate Brown's bare refusal to perform assigned work into an actual "grievance" protesting a violation of the collective bargaining agreement.[2] The evidence in the record shows that this was not the case. Brown never mentioned the collective bargaining agreement or its article on vehicle safety, or any right provided therein; nor did he attempt to involve his union representative or initiate the grievance procedure until *after* his employment was terminated (Pet. App. 4a-5a, 14a-15a). That grievance protested a different action—his termination (J.A. 66). Brown simply refused to operate a truck that he *personally* did not

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[2] Indeed, Amicus AFL-CIO's Brief (at 11-12), while avoiding the term "grievance," analyzes Brown's conduct as though factually it were precisely that.

want to drive, walked off the job, and went home. Respondent immediately terminated Brown, as a "voluntary quit," for walking off the job (J.A. 67).[3]

As will be shown herein, if Brown's conduct were indeed a "grievance" under the collective bargaining agreement, as the Board is attempting to suggest, the case would likely not be before this Court. Decisions of the Sixth Circuit and other Courts of Appeals have found the act of grieving protected by Section 7 without the need to utilize the fiction of "constructive" concerted activities raised by the Board in this case. See, e.g., *NLRB* v. *Ford Motor Co.*, 683 F.2d 156, 158 (6th Cir. 1982). The Sixth Circuit in this case held Brown's conduct unconcerted and therefore unprotected because it was neither a "grievance" nor was it conduct "with the object of inducing or preparing for group action" (Pet. App. 4a). The question before this Court—which is a mixed one of fact and law—is whether Section 7 reaches so far beyond a contract "grievance" as to cover an individual employee's work stoppage occurring without any involvement of his union or other employees or any reference to collectively bargained procedures or rights.

2. While not directly at issue before this Court, Respondent provides the following additional information to assist the Court in understanding the factual circumstances in which the dispute leading to Brown's discharge arose, as well as the procedural posture in which the case comes to this Court.

According to Brown's testimony before the Administrative Law Judge, his refusal on Monday, May 14, 1979 to operate truck No. 244 as directed by Respondent was due to a brake problem truck No. 244 had experienced two days earlier on Saturday, May 12, 1979 (Pet. App.

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[3] Respondent disagrees with the Board's statement (Brief at 4) that Respondent's supervisors "allowed Brown to go home." Brown left in defiance of their order.

2a, 13a; J.A. 11-12). However, Brown also testified that when truck No. 244's brake problem was discovered on Saturday, May 12, 1979, Respondent's mechanics stated in Brown's presence that the problem "would be fixed over the weekend or by the first thing Monday morning" (Pet. App. 2a; J.A. 7-8). The record is devoid of any evidence that from Saturday, May 12, 1979 (when the brake problem was discovered) until mid-morning on Monday, May 14, 1979 (when Brown refused to operate truck No. 244), Brown ever looked at, inspected, or tested the truck, or in any fashion investigated to see whether truck No. 244's brakes had been repaired as the mechanics said they would be (J.A. 46, 48-49, 50). Indeed, Brown had not driven truck No. 244 for an entire year (J.A. 8, 14). Respondent's procedures required preliminary inspection and testing before taking a truck out on the road (J.A. 16, 48). After Brown's refusal, another driver operated truck No. 244, that same morning, without incident (Pet. App. 19a; J.A. 43).

Both Otto Jasmund and Robert Madary, Brown's supervisors who told him to drive truck No. 244, testified at the hearing before the Administrative Law Judge that Brown (who normally operated truck No. 245) stated he was refusing to drive truck No. 244 *not* because of any claimed problem with the brakes but because of a variety of other reasons. First, truck No. 244 was normally operated by employee Frank Hamilton (who had not come in to work that Monday). Second, truck No. 244 was less desirable than truck No. 245 due to its greater length and the requirement that a tarp be pulled over the trailer with each load—which meant Brown could not make as much incentive money driving truck No. 244 (J.A. 41-42, 50-51, 56-57).[4] Furthermore, Madary

[4] Although the ALJ found that Brown was an "unreliable witness" due to his criminal conviction for uttering and publishing (J.A. 68) and his evasiveness during cross-examination (Pet. App. 10a), the ALJ nonetheless credited Brown's version of the events

testified that Brown refused on various occasions to drive other trucks as assigned because of his "fondness" for truck No. 245 (J.A. 53); and that fictitious reports of truck malfunctions by drivers (who felt like going home rather than working)—when nothing was physically wrong with the truck—continually plagued Respondent (J.A. 54).[5] Finally, one of Respondent's master mechanics, Keith Hall, testified that on the morning of May 14 Brown told a mechanic that he would not drive any truck other than No. 245 because it was a "special" unit; and that he would refuse to drive a truck with a long trailer (such as No. 244) because No. 245 was smaller and faster, easier to maneuver and unload, involved less work, and consequently permitted him to make more money (J.A. 56-58, 60).[6]

On this evidentiary record, the ALJ nevertheless held that on May 14 Brown had an "honest belief that the brakes on truck No. 244 were inadequate" based upon the problem that existed on May 12, and that this "honest belief" was the reason for Brown's refusal (Pet. App. 19a). The ALJ even purported to shift the burden of proof to Respondent by placing added reliance on the fact that Respondent had not, "by either word or demonstration," undertaken to disprove Brown's contention (Pet. App. 19a). Although not supported by any factual findings that Brown was aware of the collective bargaining agreement's provision on vehicle safety (Article XXI) (J.A. 64), or that he was asserting a right pursuant to that provision, or that truck No. 244 was indeed

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of May 14 rather than that of Jasmund and Madary due to what he characterized as their demeanor and minor inconsistencies in their testimony (Pet. App. 13a-14a).

[5] The ALJ did not deal with, or comment on, this testimony by Madary.

[6] The ALJ did not deal with, or comment on, any of Hall's testimony at the hearing, which plainly corroborated Respondent's account of the motive for Brown's refusal.

unsafe, the ALJ found "constructive" concerted activity —based upon a principle generally known as the Board's *Interboro* doctrine[7]—and held that by refusing to drive truck No. 244, which he thought was unsafe, Brown was actually "asserting a right under Article XXI of the existing collective bargaining agreement" (Pet. App. 19a):

> We have held in the past that when an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1).

Relying upon *United Parcel Service*, 241 N.L.R.B. 1074 (1979), *enforcement denied sub nom. Kohls* v. *NLRB*, 629 F.2d 173 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981), the ALJ concluded that Brown's refusal was protected by Section 7 and that Respondent violated Section 8(a)(1) by terminating him.

3. Respondent thereupon filed two exceptions to the ALJ's Decision with the Board. First, Respondent challenged, essentially as a matter of law, the *Interboro* doctrine's notion of "constructive" concerted activity upon

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[7] See *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enforced*, 388 F.2d 495, 500 (2d Cir. 1967), wherein the Second Circuit stated in the dictum of an alternative holding that individual "activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of * * * interest by fellow employees." It is this dictum, in an expanded form, which has become known as the Board's *Interboro* doctrine. The ALJ actually cited *Roadway Express, Inc.*, 217 N.L.R.B. 278 (1975), *enforced without opinion*, 532 F.2d 751 (4th Cir. 1976), which applied this doctrine in the context of a truck driver's refusal to drive a truck he thought was unsafe.

which the ALJ's holding was predicated. Second, Respondent contended that, even if the Board's *Interboro* doctrine were a permissible interpretation of Section 7, Brown's conduct failed as a factual matter to fit within its acknowledged requirements. This was so because the substantial evidence in the record as a whole established that Brown's refusal to drive truck No. 244 on the morning of May 14, 1979 was neither motivated nor justified by an honest and reasonable belief that it was unsafe—in light of both the objective evidence surrounding his refusal and the ALJ's specific findings concerning Brown's lack of credibility.

In its Decision and Order (Pet. App. 7a-8a), the Board simply adopted the ALJ's analysis and rejected both of Respondent's exceptions. The Board noted, however, that the Sixth Circuit Court of Appeals had expressly disagreed with the Board in a similar case, *Aro, Inc.* v. *NLRB*, 596 F.2d 713 (6th Cir. 1979), *denying enforcement of* 227 N.L.R.B. 243 (1976), with respect to the nature of concerted activities protected by Section 7.

4. On Respondent's petition for review, in which the same two questions were raised, the Sixth Circuit denied enforcement of the Board's Order (Pet. App. 1a-5a). As it had done several times in the past, the Court again expressly rejected the Board's *Interboro* doctrine, finding a "tension between the *Interboro* doctrine and the plain language of Section 7" which "requires that an employee engage in 'concerted activities'" (Pet. App. 3a). The Court measured Brown's conduct by the Sixth Circuit's formulation of "concerted activities" in *Aro, Inc. v. NLRB*, *supra*, 596 F.2d at 718, which is comparable to the formulations utilized by other Courts of Appeals:

> For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at

> least be made with the object of inducing or preparing for group action * * * (Pet. App. 4a).

Reviewing the record, the Court found no evidence "that Brown acted or asserted an interest on behalf of anyone other than himself";[8] or that he attempted to warn other employees; or that he was seeking the assistance of his union representative (Pet. App. 4a). Agreeing with a recent opinion by Judge Harry T. Edwards of the District of Columbia Circuit in an essentially identical case, *Kohls* v. *NLRB*, 629 F.2d 173 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981), *denying enforcement of United Parcel Service*, 241 N.L.R.B. 1074 (1979), the Sixth Circuit concluded that Brown's conduct was not concerted, and consequently was not protected by Section 7 (Pet. App. 5a).[9]

Having decided the case on a threshold legal point, the Sixth Circuit chose not to address the factual arguments raised by Respondent, i.e., that the substantial evidence in the record as a whole established that Brown's refusal to drive truck No. 244 was neither motivated nor justified by an honest and reasonable belief that the truck was unsafe (Pet. App. 5a). While the Court did not expressly set aside the Board's factual findings supporting its application of the *Interboro* doctrine, and in that sense "did not disturb them" (Board's Brief at 6), the Court did not in any fashion affirm them. This substantial

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[8] The Court noted that Brown had made an isolated remark about "put[ting] the garbage ahead of the safety of the men" (J.A. 12), but ruled that this vague comment was not substantial evidence of concertedness, and in any event had not been relied upon by the Board. Indeed, the Board has never proceeded in this case on a theory of "actual" concerted activities as opposed to "constructive" concerted activities under the *Interboro* doctrine.

[9] The Court also concluded that Brown's grievance and consultation with his union representative *after* his termination to protest the termination "involved a different interest at a later time" and was not probative as to the concertedness of his earlier refusal to drive truck No. 244 (Pet. App. 4a-5a).

evidence question, see *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), is a preserved and presently unresolved issue. Thus, if this Court were to disagree with the Sixth Circuit on the threshold legal point concerning the validity of the Board's *Interboro* doctrine, a remand to the Sixth Circuit would be necessary so as to permit consideration of Respondent's other arguments.

SUMMARY OF ARGUMENT

By its terms, Section 7 protects "[e]mployees" who "engage in * * * concerted activities for the purpose of collective bargaining or mutual aid or protection." Employee James Brown refused to perform assigned work, and walked off the job. He asserted no contractual basis for leaving. He involved neither his union nor his fellow employees in his dispute with Respondent. Nevertheless, relying upon its *Interboro* doctrine, see *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967), the Board contends that because Brown claimed the truck's brakes were unsafe before walking off the job, and because the subject of safety was addressed in the collective bargaining agreement, his individual conduct as a matter of law constituted "concerted activities" protected by Section 7.

A. Because the issue before the Court presents essentially a legal question of the Act's coverage, by which the Board seeks to move into a new area of regulation, the Board is not entitled to the deference its interpretation of the Act might be afforded if it were balancing conflicting interests within an arena clearly committed to it by Congress. See *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979).

B. The plain meaning of the phrase "concerted activities" does not permit the *Interboro* doctrine's fiction of "constructive" concerted activities. Section 7's language requires either actual group participation or conduct "engaged in with the object of initiating or inducing or preparing for group action or conduct that [has] some

relation to group action in the interest of the employees." See *Mushroom Transportation Company* v. *NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). This construction of Section 7 fully comports with the Act's purpose and at the same time preserves the integrity of its language. The Courts of Appeals, including even those few identified by the Board as accepting its *Interboro* doctrine, have consistently required conduct satisfying the *Mushroom Transportation* test as a factual predicate for concertedness. In this case, Brown's conduct failed to meet that test, as formulated by the Sixth Circuit in *Aro, Inc.* v. *NLRB*, 596 F.2d 713, 718 (6th Cir. 1979).

C. The Board bases its fiction of "constructive" concerted activities on two alternate theories or "nexuses": first, that any conduct which merely relates to a subject covered by a collective bargaining agreement is an "extension" of the earlier concerted activity that led to the agreement, and may consequently be deemed concerted; second, that conduct which relates to terms of employment may incidentally "affect" the interests of other employees, and accordingly may also be deemed concerted. Both theories ignore Section 7's two requirements—that there not only be "concerted activities" (i.e., a *means*) but also that such activities occur "for the purpose of collective bargaining or other mutual aid or protection" (i.e., a *purpose*). The Board's doctrine would delete Section 7's *means* requirement by focusing only on the *purpose* of the individual employee's conduct. The Courts of Appeals have uniformly rejected this view. See, e.g., *NLRB* v. *Northern Metal Company*, 440 F.2d 881, 884 (3d Cir. 1971); *Ontario Knife Co.* v. *NLRB*, 637 F.2d 840, 845 (2d Cir. 1980). The Board's theories have found a measure of judicial acceptance *only* in a single factual situation which, most significantly, does not require a legal fiction to produce concertedness: where an individual employee actually grieves a violation of the collective bargaining agreement and receives discipline

for so doing. See, e.g., *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967); *NLRB* v. *Selwyn Shoe Manufacturing Corporation*, 428 F.2d 217 (8th Cir. 1970); *NLRB* v. *Ben Pekin Corporation*, 452 F.2d 205 (7th Cir. 1971). In this case, Brown did not grieve or do anything which could be characterized as grieving. He was discharged for walking off the job. No Court of Appeals has ever agreed with the Board's fiction of "constructive" concerted activities on such facts. See, e.g., *Kohls* v. *NLRB*, 629 F.2d 173 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); *NLRB* v. *C & I Air Conditioning, Inc.*, 486 F.2d 977 (9th Cir. 1973).

D. The Board mistakenly suggests that the Act's legislative history supports its construction of Section 7, under which a remote theoretical nexus is said to bring purely individual conduct within its protection. The entire thrust of the Act, however, was to promote and protect *collective* and *concerted* activities—by subordinating and extinguishing *individual* interests—and by so doing to equalize the bargaining power of employees vis-a-vis their employer. See *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). This Congressional intent is also evidenced by Section 7's terminology protecting only "[e]mployees" engaging in "concerted activities," whereas comparable provisions of antecedent labor statutes explicitly covered both individual and concerted activities. See Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52; and Sections 2, 4, and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 102, 104, 113.

E. The Board's construction of Section 7 not only does violence to its language and legislative history, but also does violence to fundamental national labor policy favoring the resolution of labor disputes through private grievance arbitration. See Section 203(d), 29 U.S.C. § 173(d); *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960). The result the Board seeks encourages

individual work stoppages as an alternative to contractual grievance arbitration. Even more threatening to national labor policy, however, is the Board's acknowledged purpose of doing away with collectively bargained contract provisions which the parties intended to control the dispute at issue. The contract under which Brown worked sanctioned a refusal to drive a truck for safety reasons only where it was objectively "justified." The Board unabashedly ignored this contractual standard and substituted, as a matter of law, its own inquiry of whether he had an "honest and reasonable belief that the truck was unsafe." See *American Freight Systems, Inc.*, 264 N.L.R.B. No. 18, 111 L.R.R.M. 1385 (1982). Thus, the Board's doctrine impermissibly deprives contracting parties of their collectively bargained language, as well as their arbitrator, see *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960), and creates an unnecessary addition to an existing multiplicity of remedial structures.

That safety considerations may be involved in this case cannot alter the basic inquiry as to the construction and meaning of "concerted activities" in Section 7. Moreover, the safety concerns of employees in the workplace have been amply addressed by collectively bargained contractual provisions, as well as a variety of statutory protections. See Section 502 of the Act, 29 U.S.C. § 143; *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368 (1974). See also the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*; *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980). There need be no abstract concern that, without the Board's *Interboro* doctrine, employees such as Brown are left unprotected.

ARGUMENT

The Board's Expansive Interpretation Of Section 7 Impermissibly Extends Section 7 Beyond Both Its Plain Language And Congressional Intent, And Undermines National Labor Policy Favoring Dispute Resolution Through Private Grievance Arbitration

A. *Inasmuch as the Board's* Interboro *Doctrine Raises A Question Of The Act's Coverage, The Deference Accorded The Board In Other Contexts Does Not Apply Here*

As a preliminary matter, it should be noted that the determination of the scope of the "concerted activities" clause in Section 7 is essentially a jurisdictional or legal question concerning the coverage of the Act. See, e.g., *Krispy Kreme Doughnut Corp.* v. *NLRB*, 635 F.2d 304, 310 (4th Cir. 1980) (" 'concerted activity' is an essential predicate, in effect a jurisdictional requirement, for Board action under the Act * * *"); *NLRB* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973). As such, and contrary to the Board's suggestion (Brief at 15), this Court is not required to adopt the Board's view of Section 7 merely because it might arguably be perceived as "defensible" or "rational." This Court's review is not thus restricted.

Although the Court has observed that the Board is entitled to a measure of deference in circumstances where it balances conflicting interests or formulates technical rules within a complex arena plainly governed by the Act, see, e.g., *Charles D. Bonnano Linen Service* v. *NLRB*, 454 U.S. 404, 413-416 (1982); *NLRB* v. *Ironworkers*, 434 U.S. 335, 350 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), the Court has never hesitated to reject the Board's application of the Act where it has disregarded "plain language" and its "ordinary meaning," *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, 166 (1971); where it rested on an "erroneous legal

foundation," *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); where the Board's interpretation was "fundamentally inconsistent with the structure of the Act" and an attempt to usurp "major policy decisions properly made by Congress," *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965), or where the Board had moved "into a new area of regulation which Congress had not committed to it." *NLRB* v. *Insurance Agents*, 361 U.S. 477, 499 (1960). See generally *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979).

An unrestricted standard of review clearly applies to this Court's consideration of the question presented here, and the Board's view is entitled to no deference, because the Board's interpretation of the words "concerted activities" reads out of Section 7 an unambiguous limiting term chosen by Congress, and moves the Board into an entirely new area of regulation—*individual* activity "for the purpose of collective bargaining or mutual aid or protection"—which Congress plainly has not committed to it. As will be shown, if Congress had intended to cover such *individual* activity, it surely would not have used the words "concerted activities."

B. *The Board's* Interboro *Doctrine Effectively Deletes The Term "Concerted" From Section 7*

The portion of Section 7 pertinent to this case is as follows:

> *Employees shall have the right* to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* • • • (Emphasis added).

1. The Board's Brief (at 12) acknowledges that its *Interboro* doctrine deals with factual circumstances involving "an employee acting alone"; thus, there are no *actual* "concerted activities" in which the employee physically "engage[s]." The Board's argument accordingly

concedes that the literal language and requirement of Section 7—that the employee "engage in * * * concerted activities"—is not met under any customary understanding or definition of these terms. Indeed, Webster's Third New International Dictionary of the English Language (Unabridged 1976) defines "concerted" as "mutually contrived or planned: agreed upon" or as "performed in unison: done together." Black's Law Dictionary (5th ed. 1979) similarly defines "concerted action (or plan)" as "[a]ction that has been planned, arranged, adjusted, agreed on and settled between parties acting together pursuant to some design or scheme." This Court made clear in a comparable context involving the Act itself, in *NLRB* v. *Rice Milling Co.*, 341 U.S. 665, 671 (1951), that Congress' use (in the original Section 8(b)(4)) of the language "concerted, as distinguished from individual, conduct" established an activity threshold for the Act's coverage.

It is precisely this failure of the Board's *Interboro* doctrine to comply with the plain meaning of the statutory language which has led most of the Courts of Appeals flatly to reject it as a clear and unwarranted "expansion of the Act's coverage, in the face of unambiguous words in the statute," resulting in the creation of a "legal fiction." *NLRB* v. *Northern Metal Company*, 440 F.2d 881, 884 (3d Cir. 1971). See *NLRB* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973); *Aro, Inc.* v. *NLRB*, 596 F.2d 713, 717 (6th Cir. 1979); *Royal Development Co.* v. *NLRB*, 703 F.2d 363, 373-374 (9th Cir. 1983); *Roadway Express, Inc.* v. *NLRB*, 700 F.2d 687, 693-694 (11th Cir. 1983); *Kohls* v. *NLRB*, 629 F.2d 173, 176-177 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981) (severely questioning validity of *Interboro* doctrine and denying enforcement because factual foundation was in any event absent).[10]

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[10] In *Krispy Kreme Doughnut Corp.* v. *NLRB*, 635 F.2d 304, 307-309 (4th Cir. 1980), the Fourth Circuit expressed strong dis-

2. However, the Courts of Appeals have recognized that an excessively literal approach to Section 7's concertedness requirement may not comport with the Act's purposes and may unduly inhibit incipient organizational activity by individual employees. The Courts have accordingly utilized a test originally formulated several years before *Interboro* by the Third Circuit in *Mushroom Transportation Company* v. *NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), which addresses that concern but still preserves the integrity of the word "concerted" placed by Congress in Section 7:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was *engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.*
>
> This is not to say that preliminary discussions are disqualified as concerted activities merely because they have not resulted in organized action or in positive steps toward presenting demands. We recognize the validity of the argument that, inasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition. However, that argument loses much of its force when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to. *Activity which consists of mere talk must, in order to be protected, be talk looking toward group action.*

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agreement with the *Interboro* doctrine's rationale and refused to apply it in a case which did not involve a collective bargaining agreement. At present it apears that only the First Circuit and the Tenth Circuit have not addressed the *Interboro* doctrine.

> *If its only purpose is* to advise an individual as to what he could or should do without involving fellow workers or union representation *to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere "griping."* *Id.* at 685 (emphasis added).

The Sixth Circuit's statement in *Aro, Inc.* v. *NLRB*, *supra*, which was utilized in the instant case, paraphrases the *Mushroom Transportation* test and captures its meaning by requiring that an individual's action or complaint must not have been taken or "made solely on his own behalf," but must have been taken or "made on behalf of other employees or at least be made with the object of inducing or preparing for group action • • •." 596 F.2d at 718.[11]

It is most significant that those Courts of Appeals which the Board identifies as accepting its *Interboro* doctrine have, as will be shown in detail *infra*, in every such case invoked the doctrine in circumstances actually satisfying the *Mushroom Transportation* test.

The Sixth Circuit held in the instant case that Brown's conduct did not satisfy the *Aro* or *Mushroom Transportation* test, and this holding is factually consistent with those of other Courts of Appeals. The Board does not disagree with this conclusion, but instead argues that the *Mushroom Transportation* test fails to "appreciate either the importance of a collective bargaining agreement to individual employees or the ways in which a collective bargaining agreement is translated from mere paper

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[11] In cases involving complaints under collective bargaining agreements, the Sixth Circuit also requires that they have some "arguable basis" in the agreement. 596 F.2d at 718. This condition, of course, does not limit the concept of "concertedness," and the Sixth Circuit does not apply it in unorganized settings, i.e., where conduct has no relation to a collective bargaining agreement. See, e.g., *Timet, A Div. of Titanium Metals, Etc.* v. *NLRB*, 671 F.2d 973, 974 (6th Cir. 1982).

promises into a reality in the workplace" (Board Brief at 15).[12] To the contrary, however, the Courts fully "appreciate" the role and importance of collective bargaining agreements, but also recognize the clear limitations Congress placed in Section 7. Moreover, as will also be shown *infra*, the collective bargaining interests with which the Board is ostensibly concerned are better effectuated without the *Interboro* doctrine.

C. *The Board's Theories For Linking Individual Activity To Collective Bargaining Or Group Concern Are Merely Remote Theoretical Nexuses Which The Courts Have Consistently Rejected*

The Board advances two theories or "nexuses" which are said to justify bringing individual activity not meeting the *Mushroom Transportation* test within the scope of "concerted activities" protected by Section 7:

> [First,] the assertion of a right in a collective bargaining agreement is an *extension* of the concerted activity that gave rise to the agreement in the first place
>
> and
>
> [Second,] the claim based on the contract necessarily *affects* the rights and interests of all the other employees in the bargaining unit (Board Brief at 13-14, emphasis added).

1. It is readily apparent that both of these "nexuses" to concerted activities involve only indirect and remote theoretical linkages: either an "extension" to a *prior* group activity or an "effect" on unspecified *subsequent* group activity. In the present case there is no evidence

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[12] The Board also argues (Brief at 26-27) that the *Mushroom Transportation* test turns upon such "fortuities" as the number of employees involved in the activity, thereby creating "loopholes" in the Act's coverage. This contention clearly begs the very question under consideration here: Whether the Act's coverage was limited in that fashion by the inclusion of the term "concerted."

that Brown's conduct had any actual relation to prior activity leading to the collective bargaining agreement; nor is there evidence that his conduct affected other employees except in the most conjectural sense.

Further, and more importantly, it is evident that both of the Board's nexuses are directed only at the two "purpose" clauses of Section 7:

> Employees shall have the right * * * to engage in * * * concerted activities
>
> for the *purpose* of collective bargaining or other mutual aid or protection * * * (emphasis added).

Neither nexus focuses on, or in any sense deals with, the "means" or "conduct" clause which requires "[e]mployees" to "engage in * * * concerted activities * * *" for a designated "purpose." Thus, the Board's interpretation either ignores the term "concerted" altogether, thereby deleting it from the statute, or it creates an obvious redundancy in the statute by treating as "concerted" any individual activity which meets the requirements of the "purpose" clauses. As Professors Gorman and Finkin have explained in *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U.Pa.L.Rev. 286, 299 (1981):

> [Section 7] protects "concerted activity" which has as its purpose the "mutual aid and protection" of employees. Congress apparently contemplated concerted activity as the *means* and improvement of working conditions as the *purpose*. By defining concerted activity as conduct, even by an individual, which has some general improvement in working conditions as its purpose, the Board has in effect read out of section 7 the apparent requirement that the *means* be somehow concerted. It has substituted the independent requirement of concerted benefits for that of concerted activity, creating a redundancy in the Act (emphasis in original).

See also *Northern Metal Company, supra*, 440 F.2d at 884 ("The Act surely does not mention 'concerted purposes' "); *Ontario Knife Co.* v. *NLRB*, 637 F.2d 840, 845 (2d Cir. 1980) ("Not only must the ultimate 'objective' be mutual but the activity must be 'concerted' ").[13]

Whether judged as working a deletion or a redundancy, the Board's treatment of the term "concerted" radically modifies Section 7 by removing an express limitation and expanding the coverage of the Act to any type of individual or group activity which merely satisfies the requisite "purpose." And indeed, the Board's recent decisions bebeginning with *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1975), as well as its Brief in this Court (at 24 n. 13), make very clear that this is precisely the Board's reading of Section 7. In *Air Surrey Corp.*, 229 N.L.R.B. 1064 (1977), *enforcement denied*, 601 F.2d 256 (6th Cir. 1979), the Board stated the view that:

> [A]n individual's actions may be considered to be concerted in nature if they relate to conditions of employment that are matters of mutual concern to all the affected employees. 229 N.L.R.B. at 1064.

Similarly, in *Ontario Knife Co.*, 247 N.L.R.B. 1288, 1289 (1980), *enforcement denied*, 637 F.2d 840 (2d Cir. 1980), the Board found that an employee's "individual protest was protected because it involved a group concern." Thus, the Board's view of Section 7 would transform into protected "concerted activities" any individual word or action which merely pertains in a theoretical sense to wages, hours, or terms or conditions of employment.[14]

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[13] Cf. *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967) (attempt to enforce the provisions of a contract may be deemed for "concerted purposes"). This unexplained use of the expression "concerted purposes" in the Second Circuit's *Interboro* opinion is clarified by its recent statement in *Ontario Knife*.

[14] Even the Board has recently recognized, and possibly retreated from, the extremity of this construction of Section 7. In

2. Every Court of Appeals which has considered the Board's essentially unlimited definition of "concerted activities" or either of its two nexuses—including the Second, Seventh, and Eighth Circuits identified by the Board as accepting the *Interboro* doctrine—has rejected it as plainly beyond the language and intent of the Act,[15] except, as will be shown, in the single context of an employee's actual *grievance* under the contract. Most significantly, the three Circuits which have purported to accept the Board's *Interboro* doctrine, or have seemingly given approval to either of the Board's theories or nexuses, have done so *only* where the individual employee had actually filed a *grievance* under the collective bargaining agreement. Thus, in *NLRB* v. *Selwyn Shoe Manufacturing Corporation*, 428 F.2d 217 (8th Cir. 1970), the Eighth Circuit adverted to the Board's first nexus—i.e., that the asserting of contract rights is an extension of the concerted activity that gave rise to the contract—but it did so in the context of an employee's discharge for presenting a grievance. The Court held: "The *submission of a grievance* based on the collective

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Comet Fast Freight, Inc., 262 N.L.R.B. No. 40, 110 L.R.R.M. 1321 (1982), the Board held that a driver's refusal to drive a truck for alleged safety reasons was not "concerted" because other drivers did not mind driving it. The factual similarity but legal polarity between *Comet Fast Freight* and the instant case are striking—which either shows a substantial clouding of the Board's position in such cases or, as Board Member Howard Jenkins stated in dissent in *Comet*, the decision "reverses many years of Board precedent." 110 L.R.R.M. at 1323.

[15] *Ontario Knife Co.* v. *NLRB*, 637 F.2d 840, 845 (2d Cir. 1980); *NLRB* v. *Northern Metal Company*, 440 F.2d 881, 884 (3d Cir. 1971); *Krispy Kreme Doughnut Corp.* v. *NLRB*, 635 F.2d 304, 307 (4th Cir. 1980); *NLRB* v. *Datapoint Corp.*, 642 F.2d 123, 128 (5th Cir. 1981); *Jim Causley Pontiac* v. *NLRB*, 620 F.2d 122, 126 n.7 (6th Cir. 1980); *Pelton Casteel, Inc.* v. *NLRB*, 627 F.2d 23, 29 (7th Cir. 1980); *NLRB* v. *Dawson Cabinet Co., Inc.*, 566 F.2d 1079, 1083-1084 (8th Cir. 1977); *NLRB* v. *Bighorn Beverage*, 614 F.2d 1238, 1242 (9th Cir. 1980); *Roadway Express, Inc.* v. *NLRB*, 700 F.2d 687, 693-694 (11th Cir. 1983).

bargaining agreement cannot be the basis for discharge." *Id.* at 221 (emphasis added).

The Seventh Circuit alluded to the Board's second nexus—i.e., that the affect on other employees of the individual employee's conduct renders the conduct concerted—in *NLRB* v. *Town & Country LP Gas Service Co.*, 687 F.2d 187 (7th Cir. 1982). But the Court explicitly premised its holding on the fact that the employer had laid off and then discharged the employee due to his actual presentation of a grievance:

> This [concerted activities] requirement may be satisfied by proof that an individual employee was attempting to enforce provisions of a collective bargaining agreement *by way of the grievance procedure*, to the extent that such conduct touches on the collective interests of bargaining unit members. *Id.* at 191 (emphasis added).

The pivotal factors in every other Court of Appeals decision in which the *Interboro* doctrine has been given approval, or either of the Board's two nexuses has been invoked, have been (1) that the individual employee actually grieved and (2) that the employer's disciplinary action was grounded thereon. See *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967) (two employees grieved a number of contract violations and brought their union representative directly into the disputes, for which they were discharged); *NLRB* v. *John Langenbacher Co.*, 398 F.2d 459 (2d Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969) (three employees grieved and brought their union into a contractual pay dispute, for which they were discharged); *NLRB* v. *Ben Pekin Corporation*, 452 F.2d 205 (7th Cir. 1971) (a janitor grieved a pay shortage, which led to a meeting of all the janitors and their union representatives, for which the janitor was discharged).[16]

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[16] In *Interboro, Langenbacher,* and *Ben Pekin* the individual grievants also involved other employees, as well as their union

3. There can be little doubt that the actual presentation of a grievance by these individual employees itself satisfied the *Mushroom Transportation* test, because grieving is "initiating or inducing or preparing for group action." As the Board correctly points out in its Brief (at 20), no Court questions that an individual employee engages in protected concerted activity by filing an individual grievance under the collective bargaining agreement—including the Sixth Circuit. See *NLRB* v. *Ford Motor Co.*, 683 F.2d 156, 158 (6th Cir. 1982) ("When * * * protest [concerning terms and conditions of employment] is in the form of a grievance, filing of the grievance is a protected Section 7 activity"). See also *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 260 (1975) ("The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 * * *"); *Garment Workers* v. *Quality Mfg. Co.*, 420 U.S. 276, 280 n. 2 (1975). As the Ninth Circuit aptly observed in *NLRB* v. *Adams Delivery Service, Inc.*, 623 F.2d 96, 100 (9th Cir. 1980): "Where an employee enlists the aid of the union to enforce a contractually-guaranteed employment right, the need to employ a fiction of group activity vanishes."

In the present case, it is undisputed that Brown did not present or even attempt to present a grievance under the contract concerning the work assignment; indeed, there is no evidence that he even knew of its vehicle safety provisions until after his employment terminated.[17] He did

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representatives, as actual participants; accordingly their conduct was literally concerted. Thus, the utilization of the *Interboro* doctrine's fiction of "constructive" concerted activities was unnecessary, and plainly dictum, in each of these cases.

[17] The Board's statement (Brief at 25) that an "employee cannot be expected to assert his claim with the precision of a lawyer," citing *Love* v. *Pullman*, 404 U.S. 522, 526-527 (1972), presupposes that Brown did "assert a claim," as Love did in writing in that case. Brown did not. He simply refused to do his job as assigned, and went home. Only by the Board invoking additional presumptions

not seek in any fashion to involve his union representative. He did not "serv[e] notice" (Board Brief at 25) of a claimed contract violation on anyone. He simply refused his employer's order to operate truck No. 244, and walked off the job. Respondent discharged Brown for walking off the job—not for grieving.

4. The Board asks this Court to make an extraordinary leap from existing judicial precedent by holding this type of conduct concerted and protected against employer discipline. Every Court of Appeals which has reviewed conduct of this character has, like the Sixth Circuit in the instant case, refused to find it concerted even though a contract clause could be said theoretically to touch upon the work the employee refused to perform. Thus, in *NLRB* v. *C & I Air Conditioning, Inc.*, 486 F.2d 977, 978-979 (9th Cir. 1973), *denying enforcement of* 193 N.L.R.B. 911 (1971), the Ninth Circuit rejected the Board's contention that an individual employee's quitting work for claimed safety reasons was concerted, adopting the dissenting view of then Board Chairman Edward B. Miller (193 N.L.R.B. at 912):

> I find my colleagues' decision here to go considerably beyond the decision in [*Interboro*]. In *Interboro* the discharged individual designated the collective-bargaining agreement as the source of his claimed rights. In the present case * * * [t]here is no evidence he made any reference to the collective-bargaining agreement, or even that he knew there was one, or that he was seeking in any way to imple-

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or fictions (in addition to the fiction of "extension of the contract" or "group effect") that the employee knows of the appropriate contract clause, that he intends to rely on it, and that his employer comprehends this, see, e.g., *John Sexton & Co.*, 217 N.L.R.B. 80 (1975), can conduct like Brown's be transformed into the "assertion of a contract claim." The propriety of the Board's making presumptions of this character has been critically questioned. See, e.g., *Krispy Kreme Doughnut Corp.* v. *NLRB*, 635 F.2d 304, 309-310 (4th Cir. 1980).

> ment its terms * * *. The majority's opinion demonstrates only that Martin *might* have taken concerted action, or *might* have made a claim under the collective-bargaining agreement, had he thought of it. But the fact is there is no evidence that he did. Under these circumstances, the finding that the employee's complaints were "concerted" activity is based upon such remote and unsupported inferences that I must dissent * * *.

See also *Kohls* v. *NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981) (refusal to drive allegedly unsafe truck, on facts essentially identical to those here); *Bay-Wood Industries, Inc.* v. *NLRB*, 666 F.2d 1011 (6th Cir. 1981) (refusal to operate saw); *United Parcel Service* v. *NLRB*, 654 F.2d 12 (6th Cir. 1981) (refusal to operate trailer door). Cf. *NLRB* v. *Marsden*, 701 F.2d 238, 243 (2d Cir. 1983) ("[t]he walkout here expressed no such grievance but was merely an *ad hoc* reaction to one day's [working conditions]"). To hold Brown's conduct concerted would also give sanction to individualized work stoppages which, by avoiding contractual grievance arbitration procedures, do nothing to advance and actually undermine the cause of collective bargaining and the resolution of labor disputes.

5. The rationale of the decisions which hold that a discharge because of the filing of a grievance is a discharge because of protected concerted activities, must be kept in mind. Those decisions do not hold that the mere expedient of filing a grievance, in conjunction with a refusal to work, makes a discharge for the refusal to work unlawful. Instead, those decisions focus on the employer's reason for discharging the employee.

Thus, if an employee walks off the job because he does not like the work assigned to him, and is discharged, the discharge would, without more, unquestionably *not* be unlawful under the Act. Assume that the employee does not like the work and walks off the job, but while departing

he hands his employer a grievance stating he does not like the work, and he is then discharged. Does a discharge for walking off the job under these circumstances automatically become unlawful because a grievance was handed to the employer? Respondent emphatically says no. The focus, of course, is on the employer's reason for discharging the employee. See *NLRB* v. *Transportation Management Corp.*, 51 U.S.L.W. 4761 (June 5, 1983). If the discharge occurs because the employee walked off the job, then the employer has reacted understandably and lawfully. If, however, the employer cares not about the work stoppage but rather is outraged by being handed a grievance—perhaps he dislikes the "hassle" of processing grievances—and discharges the employee for the act of grieving, then the discharge has become unlawful.

In the instant case, Brown's failure to refer to the contract or assert a contractual basis for his walking off the job—as opposed to grieving the work assignment by word or action—is in Respondent's view not the only issue of significance. What is equally if not more significant is that Respondent did *not* discharge Brown for the act of complaining about an undesirable work assignment, but rather because he insubordinately walked off the job. A discharge for that reason, unless it is otherwise concerted by reason of group participation, e.g., *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962), is not unlawful under the Act because it is not on account of concerted activity. In contrast, a discharge for the act of grieving is a discharge in retaliation for actually engaging in concerted activities. Cf. *Garment Workers* v. *Quality Mfg. Co.*, 420 U.S. 276, 280-281 (1975).

The time-honored maxim "obey and grieve" finds application in this circumstance. The Board's response to this principle that it would be unreasonable or unfair to require an employee to work in a safety situation (Brief at 32) misses the point entirely. We must return to an examination of the statutory language, i.e., what are

"concerted activities"? The question is whether Brown's conduct—however it be characterized—was concerted so as to be protected by Section 7. Brown's reasonableness or Respondent's asserted unfairness[18] divert attention from the issue. The statutory language cannot change merely because an employee's actions may relate to a safety issue, as opposed to an unpleasant work issue. Moreover, as will be shown *infra*, the concern that employees should not be required to work in an unsafe environment has been addressed by Congress in legislation which specifically deals with an individual employee's right to refuse unsafe work.

6. In summary, the two theories or "nexuses" urged by the Board to justify its *Interboro* doctrine are precisely that: just theories. They purport to infuse a purely individual word or action with the concertedness of prior or subsequent group action, by means of remote theoretical linkages. By so doing, they expand the reach of Section 7 far beyond its plain meaning, and either excise the term "concerted" from the Act altogether or create a plain redundancy. No Court of Appeals has ever accepted the Board's theories—except in the single situation where an employer disciplines an individual employee for presenting a grievance under the collective bargaining agreement. But use of a fiction is unnecessary there because such conduct meets the *Mushroom Transportation* test. Neither Brown's conduct nor Respondent's response present that situation. Brown did nothing that constituted grieving; more importantly, though, even if he had done so, Respondent discharged him solely for walking off the job.

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[18] When it passed the Act in 1935, Congress admonished that "[n]either the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair." S. Rep. No. 573, 74th Cong., 1st Sess. 8 (1935).

The Board seeks a vast expansion of existing judicial precedent. The Fifth Circuit recently observed in *NLRB* v. *Datapoint Corp.*, 642 F.2d 123, 129 (5th Cir. 1981):

> The Board asks us to set too far-reaching a precedent, one by which virtually any action taken by a single employee in any way related to wages, hours, or the terms and conditions of employment would be considered protected concerted activity. If Congress had intended Section 7 to be read so broadly, it certainly could have done so with much more definite language, and courts would have discovered that intent long ago.

As will be shown next, ample evidence exists that Congress intended by the use of the words "concerted activities" to limit the coverage of Section 7. Congress plainly did not intend it to reach purely individual activity which merely has a remote theoretical nexus to concerted activities occurring before or after the individual activity "engage[d] in" by the employee. While the Board may believe that the goals of the Act are furthered by its expanding Section 7 (Board Brief at 19-26), it is the role of Congress to make such policy decisions.[19]

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[19] In this connection, a recent decision of this Court is instructive. In *Edward J. DeBartolo Corp.* v. *NLRB*, 51 U.S.L.W. 4984, 4986 (June 24, 1983), the Board had applied an analysis of the "distribution" requirement of the publicity proviso to Section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4), which nullified the requirement in practically every case. In rejecting the Board's interpretation, this Court stated in language equally appropriate here:

> That form of analysis would almost strip the distribution requirement of its limiting effect. It diverts the inquiry away from the relationship between the primary and secondary employers and toward the relationship between two secondary employers. It then tests the relationship by a standard so generous that it will be satisfied by virtually any secondary employer that a union wants consumers to boycott. Yet if Congress had intended all peaceful, truthful handbilling that informs the public of a primary dispute to fall within the proviso, the statute would not have contained a distribution requirement.

D. *The Act's Legislative History Buttresses The Courts Of Appeals' View That Section 7 Was Not Intended To Reach Individual Activity*

The Board argues that the Act's legislative history suggests that, when the Wagner Act was passed in 1935, Congress was simply attempting to expand the rights of an individual employee vis-a-vis his employer (as opposed to limiting the Act's protection to actual concerted activities) "so long as the [individual] employee's conduct has a reasonable nexus to collective action" (Board Brief at 18-19). The Board cites Gorman & Finkin, *The Individual and the Requirement of "Concert" Under The National Labor Relations Act*, 130 U.Pa.L.Rev. 286, 331-338 (1981), as authority for this view—which focuses on the use of the term "concerted" in certain statutes which were historical antecedents to the 1935 Wagner Act. Thus, Professors Gorman and Finkin contend that Congress essentially borrowed the term "concerted" from the criminal conspiracy and antitrust laws, and inserted it into the Wagner Act where it was not consciously intended; consequently, they posit, the term and the limiting concept of "concerted activities" in Section 7 should be excised or disregarded.[20]

This view of the Wagner Act does not withstand scrutiny. It is true that the criminal conspiracy and antitrust laws provided an historical backdrop for the Wagner Act; it is likewise true that the Wagner Act removed any doubt that employers no longer possessed the "conspiracy weapon." See *Automobile Workers* v. *Wisconsin Board*, 336 U.S. 245, 257-258 (1949). But this superficial focus ignores two critical facts which are plainly revealed both in the Wagner Act's legislative history and

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[20] It is noteworthy that, while the Board adopts some of the argument of Professors Gorman and Finkin, the Board does not adhere to their conclusion, and has always interpreted Section 7 to require either actual or constructive concerted activities.

in the language Congress selected for its principal sections.

1. The fundamental purpose of the Wagner Act was to promote and protect *concerted* or *collective* activities of employees as a means of reducing labor strife, based upon Congress' articulated determination that *individual* activity was futile in the face of large industrial employers. During the consideration of the Wagner bill in 1935, Senator Wagner stated:

> Now, it was perfectly obvious to every observer of modern large-scale enterprise that it would be impossible for employees individually to deal directly with their employers. One cannot imagine an isolated worker cooperating with the United States Steel Corporation. 79 Cong. Rec. 6184 (1935).

Senator Wagner opened the 1935 Senate debate on the bill with the following remarks:

> In this modern aspect of a time-worn problem the isolated worker is a plaything of fate. Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, he can attain freedom and dignity only by cooperation with others of his group. 79 Cong. Rec. 7565 (1935).

The Senate Report accompanying the bill identified as a major objective the equalization of bargaining power, through *collective* bargaining, because of the "relative weakness of the isolated wage earner caught in the complex of modern industrialism * * *." S. Rep. No. 573, 74th Cong., 1st Sess. 3 (1935). Congress thus recognized that only by promoting and protecting *collective* activities—as an alternative to *individual* activity—could it improve the lot of employees generally. The Act's statement of policy in Section 1 makes plain that objective; it contains no reference to individual employee activity.

Indeed, throughout the history of the Act this Court has recognized the promotion and protection of *collective*

activity as the fundamental purpose underlying the Act. See, e.g., *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34, 42 (1937); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). In *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967), the Court stated:

> The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. * * * The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.

The Court added in *NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967):

> [National labor] policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.

See also *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, 62-63 (1975).

In this light, it misapprehends the entire thrust of the Wagner Act to suggest that Congress intended the same form of protection for "individual activity" as for "concerted activities." The purpose and effect of the national labor policy created and fostered by the Act are to promote and protect collective and concerted activities by consciously subordinating individual activity and individual interest.

2. A comparison between the language of the Wagner Act and that of the antecedent statutes upon which Professors Gorman and Finkin's "borrowing" theory is based reveals radical and highly significant wording differences. These differences—which follow a consistent theme—not only substantiate the view that the Wagner Act's

purpose was to protect concerted activities, in contradistinction to individual activity, but also refute any suggestion that the term "concerted" was inadvertently included in Section 7.

Section 7 is phrased exclusively in the plural: "*Employees* shall have the right * * * to engage in * * * *concerted activities*" (emphasis added). However, the proviso to Section 9(a), 29 U.S.C. § 159(a), which was added to ameliorate certain effects of the majority rule principle, provides: "That *any individual employee or group of employees* shall have the right at any time to present grievances to their employer * * *" (emphasis added).[21] Thus, Congress manifestly knew how to provide for individual activity where it found such coverage appropriate.

In sharp contrast to Section 7, every one of the antecedent statutes evinces an intent to cover or protect *both individual and concerted* activities. Section 6 of the Clayton Act of 1914, 38 Stat. 730, 15 U.S.C. § 17, speaks of "individual members" of labor organizations; Section 20 of the Clayton Act, 29 U.S.C. § 52, directs that no "restraining order or injunction shall prohibit any person or persons, whether singly or in concert," from engaging in certain activities.

Most strikingly different is the language of the Norris-LaGuardia Act of 1932, 47 Stat. 70, 29 U.S.C. § 101 *et seq.* Section 2 of that statute, 29 U.S.C. § 102, contains the same phraseology which appeared three years later

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[21] The Board has acknowledged, see *Colonial Stores, Inc.*, 248 N.L.R.B. 1187, 1188 n.7 (1980), as does its Brief in this Court (Board Brief at 22-23 n.10), that the proviso to Section 9(a) does not furnish a basis for its *Interboro* doctrine. The proviso was added merely to remove a prohibition against an employer's processing grievances from individual employees, rather than to create any substantive right. See *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, 61 n.12 (1975); Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 622-624 (1956).

in Section 7 of the Wagner Act ("other concerted activities for the purpose of collective bargaining or other mutual aid or protection") but it is preceded by "the individual * * * worker * * *," whereas Section 7 of the Wagner Act substitutes the plural form "[e]mployees." In the same vein, Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, bars the federal courts from issuing any restraining order or injunction in any case—

> involving or growing out of any labor dispute to prohibit any person or persons * * *, whether singly or in concert, * * *

from engaging in certain described activities. Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113, uses the phrase "one or more employees" in defining a labor dispute. The same term is defined in the Wagner Act using the plural "persons." See Section 2(9), 29 U.S.C. § 152 (9).

The Wagner Act's consistent use of plural terminology in Section 7—contrasted with the singular and plural terminology utilized in the Clayton Act and the Norris-LaGuardia Act—is highly significant and cannot be overlooked. This is particularly so because Section 2 of the Norris-LaGuardia Act is an acknowledged antecedent of Section 7 of the Wagner Act. See S.Rep. No. 573, 74th Cong., 1st Sess. 9 (1935); H.R.Rep. No. 1147, 74th Cong., 1st Sess. 15 (1935); *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565 n.14 (1978).

In this historical framework, it cannot be said that Congress merely borrowed unthinkingly the language "concerted activities" while intending the same protection for individual activity. Congress explicitly chose to protect only "concerted activities"; only Congress can delete that limiting term from Section 7. Thus, the Act's legislative history is plainly inconsistent with the

hypothesis offered by Professors Gorman and Finkin and relied upon by the Board.[22]

E. *The Board's* Interboro *Doctrine Ultimately Undermines The Act's Policy Favoring Dispute Resolution Through Private Grievance Arbitration, By Interjecting The Board Into Contractual Matters, Abrogating Contractual Language, And Erecting Duplicative Remedial Tiers*

A fundamental shortcoming of the Board's *Interboro* doctrine, in the final analysis, is that it undermines private grievance arbitration as the means of resolving labor disputes and achieving industrial stability.

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[22] The Taft-Hartley Amendments to the Act in 1947, 61 Stat. 136, and the Landrum-Griffin Amendments in 1959, 73 Stat. 541, provide additional evidence of this legislative intent. Taft-Hartley made three significant amendments: First, it added Section 502, 29 U.S.C. § 143, which speaks of "an individual employee" and "an employee or employees" rather than using the plural form as in Section 7. Second, it added a secondary boycott prohibition in Section 8(b)(4), 29 U.S.C. § 158(b)(4), making it an unfair labor practice for a labor organization "to engage in, or induce or encourage the *employees* of any employer to engage in, a strike or a *concerted* refusal in the course of *their* employment * * *" (emphasis added). Third, it modified Section 7 by adding "other" before the words "concerted activities," deleting a comma after "concerted activities," and adding the clause at the end of the section providing the right to refrain from Section 7 activities.

In *NLRB* v. *Rice Milling Co.*, 341 U.S. 665 (1951), this Court held that Section 8(b)(4), as phrased, did not reach certain secondary conduct because the refusal was not "concerted," i.e., the union's action was not "aimed at *concerted*, as distinguished from *individual*, conduct by such employees" (emphasis added). 341 U.S. at 671.

In reaction to *Rice Milling*, Congress in the Landrum-Griffin Amendments modified Section 8(b)(4) by deleting the word "concerted" and changing the terms throughout from plural to singular. Congress did not at the same time modify the Act's other use of the word "concerted" in Section 7. See S. Rep. No. 187, 86th Cong., 1st Sess. (1959), *reprinted in* [1959] U.S. Code Cong. & Ad. News 2318, 2384.

Under the Board's formulation, the *Interboro* doctrine comes into play whenever an employee reacts, by word or conduct, to a situation which could involve a contract violation. The doctrine then presupposes, however, that the parties' contractually agreed upon method for resolving alleged contract violations will be incapable of furnishing a remedy. As a consequence, the Board undertakes to remedy the perceived contract violation, utilizes its comparatively slow and costly processes, substitutes its own standards and interpretations, and interjects itself into private contractual matters in ways not intended by Congress or sanctioned by this Court. In so doing, it undercuts the integrity of the contracting parties' own procedures, actually sanctions or encourages individual work stoppages, and creates an unnecessary addition to an existing multiplicity of remedial structures.

1. There can be no question in the present era that firmly embedded in our national labor policy is the principle that, where a grievance arbitration mechanism is available, its utilization is the favored method for resolving contract based disputes. Section 203(d) of the Act, 29 U.S.C. § 173(d), provides in relevant part:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

The Court cautioned in *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960), that this "policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." See also *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 581 (1960) ("the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government"); *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 376-380 (1974) (the policy favoring grievance

arbitration is equally "applicable to labor disputes touching on the safety of the employees").

In the 1947 Taft-Hartley Amendments Congress established a judicial contract remedy through Section 301 of the Act, 29 U.S.C. § 185, in lieu of a legislative proposal to make breach of a collective bargaining agreement itself an unfair labor practice remediable by the Board. See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41-42 (1947). Rejecting that proposal, the House Conference Report explicitly stated that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." *Id.* at 42. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 452 (1957). Although this Court has recognized the Board's power, in limited circumstances, to construe a collective bargaining agreement as an incident to deciding the merits of an unfair labor practice charge, see *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967), the Court has at the same time admonished that the Board is *not* to involve itself in the determination of contractual rights under an agreement. *Id.* at 428. This is especially so where grievance arbitration has been selected by the parties as the means "for composing contractual differences." *Id.* at 426. As will be seen, the Board's *Interboro* doctrine exceeds the narrow role left to it by Congress and the Court, and ultimately does violence to the policy favoring private grievance arbitration.

2. The collective bargaining agreement under which Brown worked in the instant case contained a broad grievance arbitration clause (J.A. 61-63):

> **[Article VIII, Section 1.] It is mutually agreed that all grievances, disputes or complaints between the Company and the Union, or any employee or employees, arising under the terms of this Agreement shall be settled in accordance with the procedure herein provided and that there shall at no time be any strikes, lock-outs, tie-ups of equipment, slow-**

> downs, walk-outs or any other cessation of work except as specifically agreed to in other superseding section of this Contract (J.A. 61).

Article VIII, Section 2 (J.A. 61-62) set forth a multi-step grievance procedure culminating in "final and binding" arbitration. Article XI, Section 2 of the agreement, the no-strike clause, explicitly provided for the summary discharge of employees who "disregard the arbitration and grievance procedure" (J.A. 64). However, the vehicle safety provision of the agreement interposed a qualification:

> [Article XXI, Section 1.] The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is *unjustified* (J.A. 64) (emphasis added).

Thus, conforming to national labor policy, Respondent and its employees' representative agreed to an exclusive contractual mechanism for resolving job-related disputes. They also agreed to precisely worded provisions covering employee work stoppages and the type of ostensible safety dispute at issue here. There can be no question that Brown's refusal of Respondent's directive to drive truck No. 244 was a dispute cognizable under these provisions of the collective bargaining agreement, and that the parties intended such disputes to be resolved within the contractual grievance arbitration procedure.[23] The

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[23] Of course, a union's decision not to pursue a grievance to arbitration, for any of various reasons, see *Vaca* v. *Sipes*, 386 U.S. 171, 191-192 (1967), does nothing to detract from the fact that grievance arbitration is the bargained-for and proper procedure. Inasmuch as Brown did not bring either an unfair labor practice charge under Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), or an action under Section 301 of the Act, 29 U.S.C. § 185, the propriety of the union's decision in Brown's case, as well as the propriety of Respondent's actions under the contract, may be presumed.

Board intervened in the dispute, however, by means of its *Interboro* doctrine.

3. It must be underscored that the Board's *Interboro* doctrine does more than involve the Board in interpreting contractual language. Under the doctrine the Board instead substitutes its own standard for the contractual standard, and tests the facts against this new standard, paying only lip service to the collective bargaining agreement. The agreement in this case called for an analysis of whether the employee's refusal to drive a truck was "unjustified"—an objective test common in trucking industry contracts. The Board substituted its own standard, analyzing whether Brown's refusal was based on an honest and reasonable belief that the truck was unsafe—a test clearly involving subjective factors.[24] Thus, in *American Freight System, Inc.*, 264 N.L.R.B. No. 18, 111 L.R.R.M. 1385 (1982), a case factually similar to Brown's and involving the identical *contractual* test, the Board acknowledged that it was applying a "less demanding" standard and proceeded to reject an arbitration award finding an employee's refusal to drive a truck "unjustified." 111 L.R.R.M. at 1386. If the Board does violence to labor doctrine and Congressional policy by interpreting and enforcing collective bargaining agreements, it follows that the Board does even greater violence by altogether abrogating collectively bargained contract language.

Carried to its logical conclusion, the Board's *Interboro* doctrine furnishes a basis for involving it in virtually every aspect of routine day-to-day contract administration (or, more properly, mis-administration). An em-

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[24] The Board acknowledges (Brief at 24, n.12) confusion in its decisions over whether its test is a subjective or objective one. Suffice it to say that the failure of an employee to meet the Board's test, however stated, is exceedingly rare in Board decisions. Regardless of how the Board's test is characterized, it surely is not the contractual test.

ployee who walks off the job because he believes he should have received more or less overtime work, a different job assignment, or simply more money in his paycheck, and who is discharged for walking off the job, would, under the Board's theory, be able successfully to charge the employer under the Act even though it committed no violation of the contract. The Board thus erects a second tier of "contract related" remedies which may well be totally inconsistent with what the contract provides or what the contractually designated arbitrator has determined. See, e.g., *American Freight System, Inc., supra*; *Roadway Express, Inc.*, 257 N.L.R.B. 1197 1203 (1981), *enforcement denied*, 700 F.2d 687 (11th Cir. 1983) (working rule regarding vehicle write-ups); *Albertson's Inc.*, 252 N.L.R.B. 529, 535-536 (1980), *enforcement denied*, 108 L.R.R.M. 2714, 3152 (9th Cir. 1981) (breaktime, timecard, and related policies). At this juncture the contracting parties are denied their expectation of having their decision-maker construe the contract in light of the rules, practices, and precedents of the shop. See *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960); *W. R. Grace & Co.* v. *Rubber Workers*, 51 U.S.L.W. 4643, 4645 (May 31, 1983). Such duplicative and inconsistent processes and remedies plainly undermine national labor policy favoring collective bargaining and dispute resolution through private grievance arbitration.[25]

4. Apart from these policy considerations, the Board's *Interboro* doctrine also raises intense practical problems.

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[25] One labor commentator recently observed that "the greatest threat to the integrity of the grievance arbitration process continues to come not from the courts * * *, but from the National Labor Relations Board. * * * The Board has always had an exaggerated opinion of its role and wisdom in dealing with problems of collective bargaining and contract administration." Address of Professor Donald H. Wollett delivered August 1, 1983 to American Bar Association Section of Labor and Employment Law, *reprinted in Daily Labor Report*, No. 151, D-1 at D-4 (August 4, 1983).

Parties to a collective bargaining agreement seek, by their agreement, to achieve stability in the workplace. The Board's *Interboro* doctrine impairs this objective by effectively giving employees permission to cease the performance of their work—rather than "obey and grieve" within the contractual mechanism—without relying upon any provision of the contract, without being correct as to a contractual basis, without informing the employer of a contractual basis, and, indeed, without the employer even comprehending or suspecting a contractual basis. The Board's only requirements for the application of its doctrine are (1) that the employee's conduct turn out (in retrospect) to have had some basis (with or without merit) in the contract, and (2) that the employee's conduct be honest and reasonable or, as sometimes stated, be in good faith. While the Board describes this situation as one "tailored carefully" (Brief at 23), it manifestly is not. It infuses employer-employee relations with a substantial measure of unpredictability and instability. The Board suggests (Brief at 28-30) that it provides safeguards by rendering activity unprotected if it is abusive or in violation of a no-strike clause. But these conditions are rarely found satisfied and are wholly inadequate to temper the immediate on-the-job problems and disruptions created by the Board's doctrine.[26]

5. Finally, the Board states (Brief at 30) that a refusal to perform assigned work on safety grounds is a

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[26] A no-strike clause frequently does not lend predictability to the result, but rather shifts the inquiry to whether the clause specifically proscribed the conduct or whether the waiver of the right to strike was "clear," "unmistakable," and "explicitly stated." See *Metropolitan Edison Company* v. *NLRB*, 51 U.S.L.W. 4350, 4354 (April 4, 1983). In this case Brown presumably violated the no-strike clause. Certainly the Board does not mean to suggest that if Respondent had discharged Brown specifically for violating the no-strike clause, rather than for the reason stated, this case would be in a different posture. See, e.g., *American Freight System, Inc., supra*; *Maryland Shipbuilding and Dry Dock Co.*, 256 N.L.R.B. 410, 413 n.13 (1981), *enforcement denied*, 683 F.2d 109 (4th Cir. 1982).

"special case." See also Brief of Amicus Teamsters For A Democratic Union. This Court need not be concerned, however, that the important issue of employee safety would not be addressed but for the Board's application of its *Interboro* doctrine. Employee safety is already the subject of substantial contractual and statutory protection. As a mandatory subject of collective bargaining, see, e.g., *NLRB* v. *Gulf Power Co.*, 384 F.2d 822 (5th Cir. 1967), employee safety provisions can and typically do become part of a collective bargaining agreement (as in this case). In addition to such contractual protections, employees are accorded statutory protection by Section 502 of the Act, 29 U.S.C. § 143, which states:

> nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

See *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 386-387 (1974) ("ascertainable, objective evidence" of abnormally dangerous conditions required to support a work stoppage).[27] Further, under regulations issued by the Department of Labor, 29 C.F.R. § 1977.12, pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, employees are assured the right to refuse to work under dangerous conditions without adverse action by their employer. See *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 10-11 (1980). The Court accordingly need not have an abstract concern that Brown, and others who similarly refuse to perform assigned work for

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[27] In Section 502 of the Act, 29 U.S.C. § 143, Congress established a standard or threshold governing safety related work stoppages which balances the employer's interest in getting the job done against an employee's interest in avoiding unsafe work. By applying a far less stringent standard in cases like this one, i.e., whether the employee merely had an honest and reasonable belief that the work was unsafe, the Board has nullified Congressional policy and essentially written Section 502 out of the Act.

claimed safety reasons, stand naked without a remedy. They are amply shielded by numerous layers of contractual and statutory protection.[28]

The Board's *Interboro* doctrine cannot be justified simply on a "special case" basis. The issue before this Court must be resolved exclusively on an interpretation of the meaning of the phrase "concerted activities" in Section 7. Those words and their meaning do not and cannot change chameleon-like depending on the nature of the underlying dispute. If individual employee conduct such as Brown's is not concerted when he walks off the job due to the size of his paycheck, it plainly cannot become concerted simply because he walks off the job due to an individual safety concern.

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[28] Yet another layer of protection is afforded to certain employees in the transportation industry by Section 405(b) of the Surface Transportation Assistance Act, 49 U.S.C. § 2305(b), which provides in pertinent part:

> No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment * * *.

In framing these employee protections in Section 405(b), however, Congress expressed a policy judgment by adding specific threshold requirements for its application, which Brown plainly would not have satisfied in this case:

> *** * * The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer and have been unable to obtain, correction of the unsafe condition.**

CONCLUSION

The case before this Court presents a clear example of the Board's effort in recent years to expand the coverage of Section 7 well beyond any meaning permitted by its language or contemplated by its drafters. Without doubt the Board's interpretation effectively deletes the word "concerted" from Section 7. As has been shown, the construction sought to be placed upon Section 7 by the Board in this case, and its asserted justifications for it, do not withstand scrutiny, have been rejected by the Courts of Appeals, and find no support in the Act's legislative history. Ultimately, the Board's doctrine undermines a fundamental policy of the Act—the resolution of labor disputes through grievance arbitration—and improperly interjects the Board directly into private contractual matters. The role the Board seeks for itself is redundant and inconsistent with remedies provided for in collective bargaining agreements and a variety of other statutes.

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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